FILE COPY

Office-Supreme Court, U.S.
FILED
JUL 6 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. [redacted]118

PAUL GINSBURG, Petitioner,

v.

HORACE STERN, ALLEN M. STEARNE, CHARLES ALVIN JONES, JOHN C. BELL, JR., THOMAS McKEEN CHIDSEY, MICHAEL A. MUSMANNO, and JOHN C. ARNOLD, Individually and Jointly as Justices of the Supreme Court of Pennsylvania, and PATRICK N. BOLSINGER.

BRIEF FOR RESPONDENTS, HORACE STERN AND PATRICK N. BOLSINGER, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ELDER W. MARSHALL
CARL E. GLOCK, JR.
747 Union Trust Building
Pittsburgh, Pennsylvania
Counsel for Horace Stern and Patrick N. Bolsinger, respondents.

REED, SMITH, SHAW & McCLAY
Pittsburgh, Pennsylvania
Of Counsel

SMITH BROS. CO., INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	2
Preliminary Statement	2
Statement of the Case	3
Argument	6
I. The "rights" which petitioner alleges were violated are not rights secured to him by the Federal Constitution and laws	6
II. Whether the complaint states a good cause of action is *res judicata,* and the suit no longer pends	7
III. Petitioner's right to amend his complaint as of course was terminated by entry of the final judgment against him	10
Conclusion	11
Appendix (Unpublished oral opinion of District Court, Gourley, C. J.)	12

TABLE OF CITATIONS

CASES

Belva v. Lockwood, 38 L ed 929, 154 US 116 (1894)	6
Bradwell v. Illinois, 21 L ed 442, 83 US 130 (1873)	6
Carpenter v. Erie R. Co., 178 F 2d 921 (2d Cir. 1949), cert. den. 94 L ed 1338, 339 US 912	9
Charters v. Shaffer, 181 F 2d 764 (3d Cir. 1950)	6
Commissioner v. Sunnen, 92 L ed 898, 333 US 591	9
Critchfield v. Levy, 265 Pa. 388, 109 Atl. 155 (1919)	7
De Met's Inc. v. Insull, 122 F 2d 755 (7th Cir. 1941), cert. den. 86 L ed 1205, 315 US 806	8
Feddersen Motors v. Ward, 180 F 2d 519 (10th Cir. 1950)	10

PAGE

Forman's Case, 321 Pa. 47, 184 Atl. 75 (1936) 6

In Re Disbarment Proceedings, 321 Pa. 81, 184 Atl. 59 (1936) 6, 7

June v. George C. Peterson Co., 155 F 2d 963 (8th Cir. 1942) 8

Keene Lumber Co. v. Levinthal, 165 F 2d 815 (1st Cir. 1948) 10, 11

Kelly v. Delaware River Joint Commission, 187 F 2d 93 (3d Cir. 1951) 10, 11

Knox v. First Security Bank of Utah, 206 F 2d 823 (10th Cir. 1953) 11

Liken v. Shaffer, 64 F. Supp. 432 (D. C. Iowa, 1946) 9

McGuire v. Todd, 198 F 2d 60 (5th Cir. 1952) 6

Mitchell v. Greenough, 100 F 2d 184 (9th Cir. 1938) 6

Petition of Brack, 187 Md. 407, 50 A. 2d 432 (1946), cert. den. 91 L ed 1846, 331 US 833 7

Snowden v. Hughes, 88 L ed 497, 321 US 1 (1944) ... 6

U. S. v. Moser, 69 L ed 262, 266 US 236 9

U. S. v. Munsingwear, 95 L ed 36, 340 US 36 9

Wall v. King, 206 F 2d 878 (1st Cir. 1953) 6

FEDERAL CONSTITUTION

Fifth Amendment 2

Fourteenth Amendment, § 1 2

STATUTES

28 U. S. C. § 1254 (1) 1

RULES OF COURT

Rule 17 (b) 6

Rule 17 (d) 6

AUTHORITIES

50 C. J. S. 599 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 1003

PAUL GINSBURG, Petitioner,

v.

HORACE STERN, ALLEN M. STEARNE, CHARLES ALVIN JONES, JOHN C. BELL, JR., THOMAS McKEEN CHIDSEY, MICHAEL A. MUSMANNO, and JOHN C. ARNOLD, Individually and Jointly as Justices of the Supreme Court of Pennsylvania, and PATRICK N. BOLSINGER.

BRIEF FOR RESPONDENTS, HORACE STERN AND PATRICK N. BOLSINGER, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 263 F 2d 458 and is printed at pages 3-5 of the appendix to the petition for certiorari. The opinion of the District Court has not been published, but is printed as an appendix hereto. Prior opinions in this case are reported at 125 F. Supp. 596, 225 F 2d 245, 19 FRD 238 and 242 F 2d 379.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on February 17, 1959. A petition for rehearing was denied on March 16, 1959. The jurisdiction of this Court is claimed to be invoked under 28 U.S.C. § 1254 (1), and under "the general supervisory power of this Court over lower Federal Courts."

QUESTIONS PRESENTED

1. Whether the rights which petitioner alleges were violated are rights secured to him by the Federal Constitution and laws.

2. Is the question of whether the complaint states a good cause of action now *res judicata*, so that the suit no longer pends?

3. Whether petitioner's right to amend the complaint without leave of court was terminated by entry of the final judgment against him.

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. CONST., Fifth Amendment:

> "No person shall be held etc., * * * nor be deprived of life, liberty, or property, without due process of law; * * *."

U. S. CONST., Fourteenth Amendment, § 1:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

PRELIMINARY STATEMENT

The purpose of the application for writ of certiorari is to have a review of *two judgments* of the United States Court of Appeals for the Third Circuit at Nos. 12764 and 12765. This brief is limited to defending the judgment at No. 12765, since the judgment at No. 12764 will be upheld by the Attorney General of Pennsylvania. When the words "this case" are used hereafter, the reference is to the case at No. 12765, wherein the only defendants

are Horace Stern, former chief justice of the Supreme Court of Pennsylvania, and Patrick N. Bolsinger, Prothonotary of that Court for the Western District.

STATEMENT OF THE CASE

This suit arose out of petitioner's unsuccessful effort, in 1954, to have the Supreme Court of Pennsylvania take disciplinary action against various individuals, to-wit: (1) a member of the bar of Allegheny County for alleged misconduct; (2) fifteen members of the Offence Committee who had dismissed petitioner's charges; (3) a judge of the Court of Common Pleas of Allegheny County who had dismissed petitioner's appeal from the committee's action; and (4) four individual members of the bar of the latter court.

The suit in the United States District Court for the Western District of Pennsylvania was originally lodged against Horace Stern, the then Chief Justice, and Patrick N. Bolsinger, the Prothonotary. It charged that by dismissal of the petition for disciplinary action without a hearing, followed by refusal to make the petition a matter of court record, the defendants had unlawfully denied plaintiff his rights and privileges under the Civil Rights Acts and under the Fifth and Fourteenth Amendments to the Federal Constitution.

The District Court dismissed the complaint because it failed to state a cause of action (125 F. Supp. 396). On appeal, the Court of Appeals affirmed on June 3, 1955, holding explicitly that the plaintiff "had not stated a cause of action cognizable in a U. S. District Court under the Civil Rights Acts now embodied in 42 USCA §§1983, 1985 and 1986 (1954 Supp.), or under

any other statute or rule of law." (225 F 2d 245) The order of affirmance allowed costs of $215.25 to the defendants. Before the mandate issued, the plaintiff asked the Court of Appeals for leave to amend his complaint. Such leave was denied on June 20, 1955, as was also plaintiff's petition for a rehearing. Leave to file a supplementary petition for rehearing was likewise denied on December 27, 1955.

On March 20, 1956, plaintiff moved the District Court for leave to file an amended complaint. The proposed amendment differed from the original complaint only in that it dropped the Prothonotary as a party defendant, named as defendants all of the justices of the Supreme Court, and charged that plaintiff had a legal right to prosecute his petition for disciplinary action and had been injured personally and professionally by its dismissal. The District Court refused to allow the amendment, but mistakenly entered a judgment in favor of the defendants and the other justices whom plaintiff was seeking to have joined as defendants (19 FRD 238). On appeal, the Court of Appeals on March 13, 1957 affirmed the denial of leave to file an amended complaint, but vacated the entry of judgment for all defendants, on the ground that the original judgment for the original defendants remained unchanged. It expressly characterized its first adjudication as a "final judgment" (242 F 2d 379, 381). Costs of $100.05 were taxed against the plaintiff.

From the judgments of the Court of Appeals in 1955 and 1957, plaintiff neither appealed to the Supreme Court of the United States nor asked for certiorari.

but allowed said judgments to become final. The proceeding has ever since remained a closed case.

In August 1958, a writ of attachment execution was issued by the defendants for collection of the costs previously assessed on the plaintiff by the Court of Appeals. Plaintiff then (a) moved to vacate the writ of attachment; (b) moved to vacate the 1956 order of the District Court refusing his motion for leave to file an amended complaint; and (c) gave notice of intention to take the deposition of Chief Justice Stern, for the alleged purpose of discovery and for use as evidence in the suit. After answers were filed by the defendants, and oral arguments offered by both parties, the District Court by separate orders denied plaintiff's motions and ordered that the proposed deposition should not be taken. Plaintiff incorrectly asserts that the District Court did not file an opinion. The fact is that at the conclusion of the argument and in plaintiff's presence, the hearing judge forthwith dictated his opinion into the record, and it is printed as an appendix to this brief.

From the three orders of the District Court, the plaintiff appealed. All were affirmed by the Court of Appeals in an opinion filed on February 17, 1959 (263 F 2d 458). A rehearing was denied on March 16, 1959. Thereupon the plaintiff filed the present petition for writ of certiorari, entitling the petition as though the additional justices actually had become party defendants, whereas leave to join them with the original defendants had been refused.

ARGUMENT

I. The "Rights" Which Petitioner Alleges Were Violated Are Not Rights Secured to Him by the Federal Constitution and Laws.

Matters relating to the practice of law in the state courts, like matters relating to the right to state office and other privileges granted by the state, do not involve any right guaranteed by the Federal Constitution, wherefore the denial of any such claimed right will not support a suit under the Civil Rights Act: *Snowden v. Hughes,* 88 L ed 497, 321 US 1 (1944); *Belva v. Lockwood,* 38 L ed 929, 154 US 116 (1894); *Bradwell v. Illinois,* 21 L ed 442, 83 US 130 (1873); *Mitchell v. Greenough,* 100 F 2d 184 (9th Cir. 1938); *Charters v. Shaffer,* 181 F 2d 764 (3d Cir. 1950); *Wall v. King,* 206 F 2d 878 (1st Cir. 1953); *McGuire v. Todd,* 198 F 2d 60 (5th Cir. 1952).

As a matter of state law, the Supreme Court of Pennsylvania has power not only to investigate and act upon charges of improper and unprofessional conduct, *Forman's Case,* 321 Pa. 47, 184 Atl. 75 (1936), but has power to make its own rules governing such matters: *In Re Disbarment Proceedings,* 321 Pa. 81, 184 Atl. 59 (1936). It has provided by rule a regular procedure for handling complaints against members of the bar,[1] which procedure was followed in petitioner's case.

---

1. Sub-paragraph (b) of Rule 17 creates "the Board of Governance of the Pennsylvania Bar," and sub-paragraph (d) provides:

> "Complaints against members of the bar of this Court alleging misconduct shall be made to the board; if made to the court, they *may* be forthwith certified to the board. *If the matter is of sufficient*

Quite evidently the Supreme Court did not consider petitioner's complaint of sufficient importance to necessitate further procedure, for it endorsed on the complaint:

"Petition dismissed. Per Curiam. June 28, 1954."

The *complainant* in a disciplinary proceeding has no right to a hearing on his complaint: *In Re Disbarment Proceedings,* supra (184 Atl. 59); *Critchfield v. Levy,* 265 Pa. 388, 109 Atl. 155 (1919); *Petition of Brack,* 187 Md. 407, 50 A. 2d 432 (1946), cert. den. 91 L ed 1846, 331 US 833. Whether the complaint should be proceeded with or dismissed is solely for the judgment of the court. The complainant is simply an informer, and as such he has no *right* to be heard at any stage of the proceeding, save as the court or its committee may call upon him to testify. Like any other witness, the outcome of the proceeding will not affect him or his rights in any way.

The Court of Appeals has twice held that a remediable cause of action was not laid in the complaint. Since the ruling is clearly correct, it furnishes a complete answer to the request for certiorari.

II. Whether the Complaint States a Good Cause of Action Is RES JUDICATA, and the Suit No Longer Pends.

In the first instance, the District Court dismissed the complaint for failure to state a remediable cause of

---

importance to require further investigation, the complainant shall be directed to file a formal petition in paragraph form, setting forth the charges against the respondent. If the petition is sufficient, the respondent shall be required to file an answer, * * * * " (Emphasis supplied.)

action. On appeal, the judgment was affirmed solely on the same ground. The plaintiff might then have brought the case to this Honorable Court, by appeal or petition for certiorari, but he did not and hence the judgment against him became a final judgment.

That should have ended the litigation, but plaintiff was persistent and not only asked the Court of Appeals for leave to amend, which was refused, but a year later made the same request of the District Court. This latter request was refused, and on appeal the Court of Appeals again affirmed: 242 F 2d 379. Once more the plaintiff might have appealed or asked for certiorari, but he did nothing.

The result of all this maneuvering is that there has been a final, conclusive judgment of record against the plaintiff since June 3, 1955, under which the complaint was dismissed. That judgment contains every essential element of *res judicata*,[2] and forever bars plaintiff from again asserting the same cause of action.

"A claim or demand which is put in suit and passes to final judgment is merged or swallowed up in the judgment; * * *. The judgment extinguishes the original cause of action, which loses its vitality and cannot thereafter be litigated, either as a cause of action or as a set-off or counterclaim * * *." 50 C.J.S. 599. "The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties

---

2. The elements are identity of parties, subject-matter, and cause of action: *De Met's Inc. v. Insull*, 122 F 2d 755 (7th Cir. 1941), cert. den. 86 L ed 1205, 315 U S 806; *June v. George C. Peterson Co.*, 155 F 2d 963, 965 (8th Cir. 1942).

upon any ground whatever, absent fraud or some other factor invalidating the judgment": *Commissioner v. Sunnen*, 92 L ed 898, 906, 333 US 591, 597. See also *U. S. v. Moser*, 69 L ed 262, 264, 266 US 236, 241; *Carpenter v. Erie R. Co.*, 178 F 2d 921 (2d Cir. 1949), cert. den. 94 L ed 1338, 339 US 912.

A final judgment operates as *res judicata* and as a bar to relitigation of the controversy, and the cause of action merges in the judgment, where the time to appeal has expired without an appeal being taken: *U. S. v. Munsingwear*, 95 L ed 36, 40, 340 US 36, 38. This is so even though the judgment was entered on the sustaining of a demurrer: *Liken v. Shaffer*, 64 F. Supp. 432, 445 (D. C. Iowa, 1946).

In his instant effort to have vacated the 1956 order of court which refused his motion for leave to amend, plaintiff has not even submitted the form of complaint he would file if permission were granted. It may be presumed he would offer the same amended complaint as he sought to file in 1956, and which the Court of Appeals had described in these words (242 F 2d 379, 380):

> "An examination of the proposed amended complaint sought to be filed by Ginsburg in the court below * * * discloses no new ground for the relief sought by him."

Plainly *res judicata* is a bar to the plaintiff's endeavor to reopen a case in which the very question now raised was long ago decided against him.

The basis of plaintiff's claim to renew the litigation by amending his complaint and so to escape payment of costs is his mistaken supposition that the issues which

were involved in the action "have not yet been finally determined" and that the suit is currently pending. Actually, the suit no longer pends, for the District Court dismissed it in October 1954, and its ruling was expressly affirmed by the Court of Appeals, with costs to the defendants. That adjudication has never been reversed, vacated or modified. As the Court of Appeals said in a subsequent opinion, its adjudication of plaintiff's first appeal was *a final* judgment (242 F 2d 379). In consequence, such final judgment spelled *finis* to the suit, and it no longer pends.

Absent a pending suit, to require a deposition to be given by Judge Stern would be to compel the doing of a vain and fruitless thing. Moreover, the finality of the judgment in the case made the costs imposed on plaintiff payable forthwith, and issuance of an attachment for their collection was in no wise premature.

III. Petitioner's Right to Amend His Complaint As of Course Was Terminated by Entry of the Final Judgment Against Him.

Petitioner claimed below, and now reiterates, that Rule 15 (a) gave him the right, as a matter of course and without leave of court, to amend his complaint once before a responsive pleading was served upon him. On the contrary, it is well settled that the right to amend as a matter of course under Rule 15 (a) terminates at the entry of judgment: *Kelly v. Delaware River Joint Commission,* 187 F 2d 93 (3d. Cir. 1951); *Feddersen Motors v. Ward,* 180 F 2d 519 (10th Cir. 1950); *Keene Lumber Co. v. Levinthal,* 165 F 2d 815 (1st Cir. 1948). Thereafter amendment may be permitted only at the dis-

cretion of the court upon appropriate application under Rule 59 (b) and (e) or Rule 60 (b): *Kelly v. Delaware River Joint Commission,* supra; *Keene Lumber Co. v. Levinthal,* supra; *Knox v. First Security Bank of Utah,* 206 F 2d 823 (10th Cir. 1953). Here, petitioner did not bring his application under any of the rules cited.

Moreover, the Court of Appeals in 1955 denied plaintiff's motion to amend (225 F 2d 245); the District Court twice, in 1956 and 1958, refused leave to amend the complaint; and the Court of Appeals twice affirmed such judgment of the District Court. Since manifestly the proposed amendments did not set forth a good cause of action, neither court abused its discretion in refusing permission to file them.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ELDER W. MARSHALL
CARL E. GLOCK, JR.
747 Union Trust Building
Pittsburgh, Pennsylvania
Counsel for Horace Stern and Patrick N. Bolsinger, respondents.

June 1959.

REED, SMITH, SHAW & MCCLAY
Pittsburgh, Pennsylvania
Of Counsel

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PAUL GINSBURG, Appellant
v.
HORACE STERN et al.

Civil Action
No. 12,643

Unpublished Oral Opinion of the Court

The Court (Gourley, C. J.):—

. . . The Court will state its opinion for the record. . . . This proceeding has been pending in this Court since August 31, 1954. There have been divers hearings before this Court and the United States Court of Appeals for the Third Circuit relative to whether as a matter of law, this plaintiff has the right to institute action against one or more members of the Supreme Court of the Commonwealth of Pennsylvania and the then acting prothonotary of said court.

After a hearing before the United States Court of Appeals for the Third Circuit which affirmed the judgment of this Court, a mandate was issued by the appellate court under the seal of the clerk as set forth to this Court dated June 2nd, 1955, and the mandate reads inter alios as follows:

"It is here ordered adjudged by this Court that the judgment of the District Court be and the same is hereby is affirmed with the costs. Said costs to be recovered by appellees Horace Stern and Patrick N. Bolsinger. Amount of costs is taxed $215.25."

Subsequent to that date, other matters were presented to the District Court which again resulted in an appeal being had to the United States Court of Appeals for the Third Circiut and it appears from a mandate issued under the seal of said Court signed by the clerk of the appellate court, said mandate provided inter alia, "The order of the Court of July 19, 1956"—that's referring to the District Court "denying the plaintiffs leave to file an amended complaint be and the same is hereby affirmed, and costs to be recovered by Horace Stern, et al, appellants," which as I read the mandate, made reference to Patrick N. Bolsinger as the et al individual, the amount of said costs being $100.05.

On August 13, 1958, counsel for the defendants presented to the Court a praecipe in the nature of a motion, a praecipe and motion for writ of attachment execution relative to the costs which I heretofore made reference to, the total amount of said costs in the two appeal mandates being $315.30.

The Court issued an order on August 13, 1958,—this Court did—directing the Mellon National Bank and Trust Company, garnishee, to appear on or before September 10th, 1958, to show cause why the defendant's judgment for costs shall not be levied on the effects of the plaintiff's in its hands. It has been stated to the Court during the extended argument that the amount of the costs are not being questioned, although the question is being raised as to the authority of the United States Court of Appeals to direct the payment of said costs by the plaintiff.

After the issuance of the attachment, arrangements were made between the bank and the plaintiff whereby

until the disposition of the matters now before this Court, the amount of $500 was to be set aside from the plaintiff's account and held in the nature of an escrow fund by the Mellon Bank until the determination of the matters before this Court which I have heard this date.

After the issuance of the writ of attachment on August 13, 1958, the plaintiff, Paul Ginsburg, filed with the Court a motion to vacate the writ of attachment execution and to dissolve the attachment. It is claimed that the United States Court of Appeals for the Third Circuit had no authority in law to direct the payment of the costs in the matters heard by that Court. Assuming, but not admitting that the cost is proper, if the appellate court did have the authority to direct the payment of the costs since the civil action has remained open in this Court and that under the provisions of the Judicial Code, to wit, 28 U.S.C.A., 1651, which reads inter alia as follows: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the useage and principles of law," the matter remains open as a civil action for the reason that the plaintiff has the right in law to go before the Supreme Court of the United States requesting the issuance of writs which the plaintiff feels would be justified in aid of the relief which he asks. As a result of the provision of the Judicial Code which I just read and without any consideration to the motion which is also pending before this court to permit the filing of an amended complaint, the civil action remains open, there is not a final judgment and due to the reasons just stated. the motion which the plaintiff filed to vacate the writ

of attachment execution and to dissolve the attachment should be granted.

Contemporaneous with the filing of the motion just made reference to the plaintiff also filed a motion to vacate the order refusing the motion for leave to file amended complaint and for other relief. In this motion the plaintiff claims that the United States Court of Appeals for the Third Circuit had no authority to enter any order denying the right of the plaintiff to file an amended complaint and that since the United States Court of Appeals for the Third Circuit exceeded its authority and in view of the fact that the United States Court of Appeals for the Third Circuit in its affirmation of this Court's decision did not sustain or affirm this Court for the same reasons that the District Court denied the motion to dismiss, that this Court has authority in law to permit the filing of the amended complaint and for all practical intents and purposes to reverse the decision of the United States Court of Appeals for the Third Circuit.

Each of the motions to which I have just made reference was filed in this Court on August 26, 1958 and answers to each of the motions have been filed by the defendants.

In addition to the motion just made reference to, the plaintiff served notice on Horace Stern that it was desired to take the deposition of Horace Stern for the purpose of discovery and to be used as evidence in connection with preparing for trial argument or hearing the motion that had been filed by the plaintiff for leave to file the amended complaint.

The Court is of the following opinion and judgment in connection with each of the motions: It is not the province, authority or jurisdiction of the United States District Court to consider the wisdom, the reasons, the attitude or the justification for a decision entered by a United States Court of Appeals. I have no such jurisdiction, I have no such authority and I would not criticize or engage in any inquiry as to why an appellate court would reach a conclusion as written or as ordered.

It is my best judgment reading the mandates issued by the appellate court, that the judgments entered by the Court relative to costs are final orders. I know nothing of the reasons for their conclusions, I am not questioning it, I have no authority to question it and therefore the mandates issued by the Court in connection with the two appeals in which it was directed that the costs be paid by the plaintiff are valid subsisting legal orders. The costs have not been paid. There was nothing pending before this Court in any way whatsoever at the time the writ of attachment was executed and therefore, the writ of attachment is proper and will not be disturbed.

Contemporaneously with the filing of the motion to vacate writ of attachment was filed a motion to vacate an order which this Court has entered and which was affirmed by the appellate court which denied the plaintiff leave to file an amended complaint. That motion must be refused. I have no authority to permit it to be granted and therefore the motion to vacate the order entered by this Court heretofore which refused the right of the plaintiff to file an amended complaint is denied.

Since there is nothing in any way whatsoever pending before this Court or any other court as I review the

record and pleading, with due deference to plaintiff's position, there is no basis to permit the taking of the deposition of Horace Stern and/or Patrick N. Bolsinger and therefore, the motion of the defendant to restrain the taking of the deposition of Horace Stern and I will also substitute Patrick N. Bolsinger, is granted. A written order will be entered refusing each of the motions as I have orally expressed for the record. The reporter is directed to transcribe this record at the joint expense of the parties in full and complete as stated by counsel and the Court and have the same available for any appellate court who might have occasion to consider the problems here presented.